Civil Resolution Tribunal

Date Issued: January 7, 2022

File: ST-2021-003858

Type: Strata

Civil Resolution Tribunal

Indexed as: *Day v. The Owners, Strata Plan VR 320*, 2022 BCCRT 11

B E T W E E N :

DANIEL DAY

APPLICANT

A N D :

The Owners, Strata Plan VR 320

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Leah Volkers

INTRODUCTION

1. The applicant, Daniel Day, is a former owner of strata lot 3 (SL3) in the respondent strata corporation, The Owners, Strata Plan VR 320 (Strata).

2. Daniel did not provide his preferred title and asked to be referred to as either Daniel or Daniel Day in this dispute. So, I will refer to Daniel by his first name, intending no

disrespect. Daniel is self-represented. The strata is represented by the strata council president.

3. Daniel says the strata's February 25, 2021 AGM (1st AGM) did not comply with the *Strata Property Act* (SPA), and is invalid as a result. Daniel says the resolutions approved at the 1st AGM, including a special levy, are also invalid. Daniel asks for an order "to legally invalidate" the 2021 AGM, and an order that the strata refund him $18,700.20 in special levy payments for SL3's share of the special levy that he paid prior to selling SL3 in May 2021, and $395.65 in increased strata fees.

4. The strata does not dispute that the 1st AGM was invalid, but opposes Daniel's requested orders. The strata says it required restricted proxy voting for the proposed resolutions at the 1st AGM, including the special levy, because British Columbia had limited meetings to 50 people during the COVID-19 pandemic. The strata says it was not aware that restricted proxy votes were contrary to the SPA until after the 1st AGM, and says it held another AGM in July 2021 (2nd AGM) to correct the 1st AGM irregularities, including "validating" the special levy. The strata also says Daniel did not request a hearing before starting this dispute as required by the SPA, and so his claims should be dismissed.

JURISDICTION AND PROCEDURE

5. These are the formal written reasons of the Civil Resolution Tribunal (CRT). The CRT has jurisdiction over strata property claims under section 121 of the *Civil Resolution Tribunal Act* (CRTA). CRTA section 2 says the CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the CRT must apply principles of law and fairness, and recognize any relationships between the dispute's parties that will likely continue after the CRT process has ended.

6. CRTA section 39 says the CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. Here, I find that I am properly able to assess and weigh the documentary evidence

and submissions before me. Further, bearing in mind the CRT's mandate that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary in the interests of justice and fairness.

7. CRTA section 42 says the CRT may accept as evidence information that it considers relevant, necessary and appropriate, even where the information would not be admissible in court. The CRT may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.

8. CRT section 61 says that the CRT may make any order or give any direction in relation to a CRT proceeding it thinks necessary to achieve the objects of the CRT in accordance with its mandate.

9. Under CRTA section 123, in resolving this dispute the CRT may order a party to do or stop doing something, order a party to pay money, or order any other terms or conditions the CRT considers appropriate.

Late evidence

10. Daniel submitted late evidence in this dispute with his final reply submissions. The strata was provided with an opportunity to review the late evidence and to provide further submissions on it, which it did. The strata did not object to the late evidence. Consistent with the CRT's mandate that includes flexibility, I find there is no actual prejudice to the parties in allowing this late evidence. I therefore allow the late evidence, and have considered it.

Former owner

11. It is undisputed that after Daniel filed his dispute application with the CRT, he sold SL3 to a third party that is not a party to this dispute. In *Downing v. Strata Plan VR2356*, 2019 BCSC 1745, the BC Supreme Court said that the fact that an owner becomes former owner does not, by itself, result in their no longer being an "owner" under the SPA or remove the CRT's ability to decide a dispute. The court also noted the finding in *The Owners, Strata Plan LMS 3259 v. Sze Hang Holding Inc.*, 2016 BCSC 32, that the SPA definition of "owner" includes former owners. Given these

binding decisions, I find that I have jurisdiction to consider Daniel's claim even though he no longer owns SL3.

ISSUES

12. The issues in this dispute are:
    a. Did Daniel fail to request a strata council hearing before filing this CRT dispute, and if so, should his claims be dismissed?
    b. Was the 1st AGM held in compliance with the SPA?
    c. If not, must the strata reimburse Daniel $18,700.20 in special levy payments, and what other remedies are appropriate?

EVIDENCE AND ANALYSIS

Did Daniel fail to request a strata council hearing before filing this dispute, and if so, should his claim be dismissed?

13. SPA section 189.1(2) says an owner may not file a CRT dispute application unless they have requested a strata council hearing.

14. The strata says Daniel did not request a council hearing as required under SPA section 189.1. Daniel says he left a "phone message" with strata council requesting a hearing. The strata does not specifically dispute this, but says Daniel did not request a hearing as required by SPA section 34.1. SPA section 34.1 requires a hearing request be made in writing. I find a phone message is not a written request for a hearing. I find I do not need to determine whether Daniel requested a hearing in the phone message because even if he did, it does not comply with SPA section 34.1.

15. Daniel also says he emailed the strata council president and the strata's property manager "asking for his money back" and advising he would "complain" to the CRT. He says these emails should be considered his request for a hearing. The strata disputes this. I have reviewed the emails in evidence, and I find Daniel did not request a hearing in any of them. There is no other evidence before me that shows Daniel

requested a hearing prior to filing his dispute application on May 13, 2021. So, I find Daniel did not request a hearing.

16. SPA section 189.1(2)(b) says the CRT can waive the hearing requirement on request. The strata says Daniel did not make any such request, and the CRT should not elect to waive the requirement without Daniel's request to do so. SPA section 189.1(2)(b) does not say how a person must make the request, and I find that the request can be implied from conduct. Here, I infer from Daniel's conduct in proceeding with this dispute that he asks for the CRT waive the hearing requirement.

17. I have also considered the strata's position in conjunction with the CRT's mandate under section 2(2) of the CRTA. The mandate is to provide dispute resolution services, for matters that are within the CRT's authority, in a manner that is "accessible, speedy, economical, informal and flexible". I find that refusing to resolve this dispute and referring the matter of a hearing back to facilitation, or to obtain further submissions from the parties, would be wasteful of the CRT's resources. Given that the strata does not dispute that the 1st AGM special levy vote was invalid, but disputes whether Daniel is entitled to a refund of $19,095.85 in special levy charges, I find it unlikely the parties will resolve the issues in this dispute at a council hearing. I also find the CRT's services would be unreasonably delayed, contrary to its mandate.

18. Therefore, under the authority of section 61(1) of the CRTA, I waive the requirement for a council hearing request under section 189.1(2) of the SPA and will consider this dispute on its merits.

Did the 1st AGM comply with the SPA?

1st AGM

19. It is undisputed that at the 1st AGM, the owners voted by restricted proxy to approve replacement of the garden membrane, funded in part through the contingency reserve fund and in part through a $2,250,000 special levy.

20. Daniel say the 1st AGM as a whole was conducted contrary to the SPA. The strata does not dispute that the owners' votes at the 1st AGM were by restricted proxy and did not comply with the SPA. For the reasons that follow, I agree with the parties.

21. The strata says it conducted the 1st AGM by restricted proxy because it could not accommodate all of the owners in person. The strata says BC's public health order in effect at that time limited gatherings to 50 people, and the strata property manager's online platform for conducting AGMs was not available in time for the AGM. While I accept that the COVID-19 restrictions posed significant challenges to the strata holding an AGM, the strata did not explain why it could not have conducted the 1st AGM via another online or telephone platform, for example, by Zoom or teleconference. I accept the strata did not intentionally conduct the 1st AGM contrary to the SPA, and did not do so with a nefarious purpose or in bad faith. However, the strata is still required to comply with the SPA when conducting an AGM.

SPA voting requirements

22. SPA section 54 sets out a person's right to vote at an AGM or SGM. Generally, all owners, and in some cases tenants and others, can vote.

23. Section 49(1) of the SPA says a strata may, by bylaw, provide for attendance at an AGM or SGM by telephone or any other method, if the method permits all persons participating to communicate with each other.

24. At the time of the 1st AGM, the strata did not have a bylaw providing for telephone or electronic attendance. However, on April 15, 2020, the Minister of Public Safety and Solicitor General issued Ministerial Order No. M114 under the *Emergency Program Act*. That order enables strata corporations to conduct meetings, including SGMs and AGMs, electronically (by telephone or other electronic methods), during the provincial state of emergency. The only requirement is that all persons can communicate with each other. The order applies to all strata corporations whether or not they have a bylaw allowing general meetings to be held electronically.

25. The *COVID-19 Related Measures Act* (CRMA) extends the ability of strata corporations to hold electronic meetings for 90 days after the date on which the last extension of the declaration of a state of emergency expires or is cancelled.

26. Although Ministerial Order No. M114 is permissive, there is nothing in the SPA that allows the strata corporation to prevent people from participating in AGMs or SGMs. The result is that if the strata corporation conducts an AGM or SGM and cannot safely accommodate participants in a physical meeting space, it must provide for electronic attendance and voting.

27. Section 56 says a person who may vote under section 54 may vote in person or by proxy. Nothing in the SPA gives a strata corporation the power to restrict a person's choice of proxy. Under section 56, a person may appoint any proxy other than an employee of the strata or a person who provides management services to the strata.

28. In *Shen v. The Owners, Strata Plan EPS3177*, 2020 BCCRT 1157, a CRT member found a ¾ resolution vote invalid where the strata did not allow all eligible voters and proxies to attend, and restricted the voters' ability to choose a proxy, among other irregularities. The CRT member ordered the strata not to act on the vote results.

29. As noted, the parties do not dispute that the strata required the strata owners to vote by restricted proxy at the 1st AGM, which is contrary to the SPA. I agree, and I find the strata was not entitled to restrict the owners' proxy votes at the 1st AGM. So, I find the 1st AGM did not comply with the SPA. It follows that the resolutions approved at the 1st AGM are invalid.

30. Daniel also raises other irregularities with the 1st AGM not being conducted in accordance with the SPA. However, as I have already found that the resolutions passed at the 1st AGM are invalid, I find it is not necessary to address these other irregularities.

Must the strata reimburse Daniel for his special levy payments, and what other remedies, if any, are appropriate?

31. Daniel asks for an order that the 1st AGM be declared "legally invalid" and an order that the strata refund him $18,700.20 for special levy payments.

32. Declaring the 1st AGM invalid is a declaratory order the CRT does not have jurisdiction to make: see *Fisher v. The Owners, Strata Plan VR 1420,* 2019 BCCRT 1379. So, I decline to do so. However, under CRTA section 123(1), the CRT does have jurisdiction to order a strata to do or stop doing something, or pay money, which could include ordering the strata to stop acting on the invalid special levy resolution, or to refund Daniel's special levy payments. I discuss appropriate remedies below.

2nd AGM and special levy payments

33. The strata says that it "corrected" the 1st AGM voting issues at the 2nd AGM held in July 2021, including ratifying the special levy vote from the 1st AGM. The strata says the special levy is still due and payable by Daniel on that basis. Daniel disputes this, and says he is not responsible to pay for a special levy that was not approved until the 2nd AGM, after he sold SL3 to a third party. SL3's new owner is not a party to this dispute. The parties do not dispute that the special levy resolution approved at the 2nd AGM is valid.

34. The strata also argues that Daniel's requested order for a special levy refund is moot because the special levy was approved at the 2nd AGM, so the issue in this dispute has disappeared. However, as it is undisputed that Daniel sold SL3 between the 1st AGM and the 2nd AGM, and did not own SL3 at the time of the 2nd AGM, I find the issue whether Daniel is responsible to pay SL3's share of the special levy is not moot and I will address it.

35. The strata referred me to *Hodgson v. The Owners, Strata Plan EPS 3177*, 2021 BCCRT 463 and *Raitt v. The Owners, Strata Plan LMS 1087*, 2021 BCCRT 683 in support of its position that Daniel should still be responsible to pay for SL3's share of the special levy. In *Hodgson*, another tribunal member found that an AGM was not conducted in accordance with the SPA, but declined to invalidate the AGM votes, and

ordered the strata to hold a special general meeting to vote retroactively on the AGM agenda items. In *Raitt*, another tribunal member found that the strata in that dispute did not comply with the SPA when approving a contingency reserve fund (CRF) expenditure for security hardware, but declined to invalidate the vote because the invoice had already been paid.

36. First, I note that CRT decisions are not binding on me. Second, I note that in both *Hodgson* and *Raitt*, no special levy was at issue. Here, the issue is whether Daniel is responsible for paying SL3's share of the special levy approved at the 2nd AGM, after he sold SL3. I find this is different from the issues in both *Hodgson* and *Raitt*. Specifically, the timing and approval of CRF expenditures, or other agenda items approved at an AGM or SGM (including budgets and strata fees among other things) do not affect a particular owner's payment obligations in the same manner as the timing of a special levy. This is particularly true where an owner in is in the process of selling their strata lot, as is the case here. The SPA also sets out specific requirements for payment of special levies that were not at issue in either *Hodgson* or *Raitt*.

37. SPA section 109 says that when a special levy is approved before a strata lot is conveyed to a purchaser, the seller (here, Daniel) is responsible for any portions of the special levy that are due and payable before the conveyance, and the purchaser is responsible for any portions of the special levy that are due and payable after the conveyance. However, as I have found the proposed special levy was not properly approved at the 1st AGM in February 2021, I find that no special levy was approved before Daniel conveyed SL3 to a third party in May 2021. So, I find SPA section 109 does not apply to this dispute.

38. SPA section 108(3) says that a resolution to approve a special levy must set out, among other things, "the date by which the levy is to be paid". The special levy resolution at the 2nd AGM said, in part, that the "special levy of $2,250,000 was a ratification of the vote that was held on February 25, 2021 and was deemed due and payable on that date, and shall, upon ratification now become *due and payable in full immediately on the passing of this resolution by the owners on title as at the end of*

that day and any owner who sells, conveys, or transfers his/her title, or re-mortgages, before payment of this special levy is made in full, shall then pay the full amount outstanding" (my emphasis added).

39. The special levy resolution passed at the 2nd AGM stated the special levy was "due and payable immediately on the passing of this resolution by the owners on title as at the end of that day". I find this means the special levy was due and payable on the date it was approved at the 2nd AGM in July 2021. It is undisputed that Daniel no longer owned SL3 at the time of the 2nd AGM. A March 23, 2021 contract of purchase and sale in evidence shows that Daniel agreed to sell SL3 to a third party, and listed a May 31, 2021 completion date. So, I find Daniel sold SL3 on May 31, 2021, before the 2nd AGM. Based on the SPA and the wording of the special levy resolution, it follows that Daniel is not responsible to pay SL3's share of the special levy.

40. The strata argues that the special levy approved at the 2nd AGM was due and payable retroactively on February 25, 2021. To the extent that the strata seeks to make Daniel, a former owner, responsible for a special levy that was not approved until July 2021 at the 2nd AGM, and after he sold SL3 to a third party, I find it is not entitled to do so under the SPA. I find that the strata does not have authority under the SPA to retroactively approve a special levy. Even if I am wrong, and the special levy could have been approved retroactively, I find the special levy resolution itself did not say the special levy was due and payable on February 25, 2021. Rather, as noted, I find the special levy was made immediately due and payable on the date it was approved at the 2nd AGM. So, I find that Daniel is not responsible to pay SL3's share of the special levy.

41. The parties do not dispute that Daniel paid for SL3's share of the special levy at the time he sold SL3. The strata submitted the tenant ledger in evidence and a statement from its property manager that listed Daniel's special levy amount at $18,700.20. In a May 27, 2021 email from Daniel to his notary for SL3's sale, Daniel confirms that $18,700.20 is the "total amount of assessment approved on an AGM that may be declared invalid". So, I find that Daniel paid a total of $18,700.20 for the invalid special levy and he is entitled to a refund of that amount.

42. Both parties also provided submissions and evidence related to Daniel's sale of SL3 to a third party. However, beyond confirming the date when Daniel ceased to own SL3, I find the specific details of SL3's sale are not relevant to whether Daniel is responsible under the SPA for the special levy approved at the 2nd AGM. So, I have not addressed SL3's sale further. It may be that Daniel has contractual responsibilities to SL3's purchaser, but that issue is not before me.

Increased strata fees

43. As noted, Daniel also claims a refund of $395.65 for increased strata fees from January 2021. However, he did not make any submissions in support of this claim, and did not provide any documentation to prove he is entitled to a refund of this claimed amount. Rather Daniel's submissions were focused on the special levy. As noted, Daniel has the burden of proving his claims. Here, I find he has not met the burden of proving he is entitled to any strata fee refund. So, I decline to grant any award for the reimbursement of increased strata fees.

CRT FEES, EXPENSES AND INTEREST

44. Under section 49 of the CRTA, and the CRT rules, the CRT will generally order an unsuccessful party to reimburse a successful party for CRT fees and reasonable dispute-related expenses. However, Daniel did not pay any CRT fees or claim any dispute-related expenses, so I award none.

45. The *Court Order Interest Act* (COIA) applies to the CRT. Daniel is entitled to prejudgment interest on the $18,700.20 special levy amount paid. It is unclear exactly what day Daniel paid the special levy, but I find it was in May 2021. So, in the circumstances, I find it reasonable to award prejudgment interest from May 1, 2021, to the date of this decision. This equals $57.97.

ORDERS

46. Within 30 days of the date of this decision, I order the strata to pay Daniel a total of $18,758.17, broken down as follows:

a. $18,700.20 as reimbursement for special levy payments, and

b. $57.97 in pre-judgment interest under the COIA.

47. Daniel is also entitled to post-judgment interest under the COIA.

48. Under section 57 of the CRTA, a validated copy of the CRT's order can be enforced through the British Columbia Supreme Court. Under section 58 of the CRTA, the order can be enforced through the British Columbia Provincial Court if it is an order for financial compensation or return of personal property under $35,000. Once filed, a CRT order has the same force and effect as an order of the court that it is filed in.

Leah Volkers, Tribunal Member